

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 2, 2008 Session

JENNIFER H. BROWN v. WILLIAM RICHARD BROWN

**An Appeal from the Chancery Court for Cheatham County
No. 12744 Donald P. Harris, Chancellor**

No. M2008-00788-COA-R3-CV - Filed May 14, 2009

This is a divorce case involving child custody issues. When, the parties married, the mother was nineteen years old and the father was forty-two years old. They had three children during the fifteen-year marriage. The mother filed for divorce. After a trial, the mother was designated as the primary residential parent for the stated reason that the father was then fifty-eight years old and needed to be free to continue to earn income for the benefit of the family for as long as possible. The trial court did not award monthly alimony, but the mother received an award for attorney's fees as alimony *in solido*. The father now appeals, challenging the trial court's designation of the mother as the primary residential parent and its award of attorney's fees to the mother. We affirm, finding no abuse of the trial court's discretion in either decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

Jerry W. Hamlin, Ashland City, Tennessee, for the appellant, William Richard Brown.

Robert L. Jackson and Elizabeth A. Garrett, Nashville, Tennessee, for the appellee, Jennifer H. Brown.

OPINION

Plaintiff/Appellee Jennifer H. Brown ("Mother") and Defendant/Appellant William Richard Brown ("Father") were married on August 31, 1992, when Mother was nineteen years old and Father was forty-two years old. Three children were born of the marriage, a son born July 9, 1996, and two daughters born January 29, 1998 and March 4, 2001. On November 17, 2005, Mother filed a petition for divorce.

Prior to the birth of their first child, Mother worked at various places as a waitress, as a receptionist in Father's hair salon, and as a manicurist. After their first child was born in 1996,

Mother stayed home to care for the children and did not work outside the home. By the time of the trial below, Mother had returned to the workforce and was employed by a publishing company, working twenty to twenty-five hours per week, earning about \$900 per month.

During the parties' marriage, Father was a hair stylist; he was part owner of the salon at which Mother had worked as a receptionist. During the course of the marriage, Father sometimes worked two or three different jobs to provide for the family. At the time of trial, Father was working as a cosmetic laser operator. Though his earnings fluctuated somewhat because he worked on commission, they averaged approximately \$3,256 per month.

The trial in this matter was conducted on February 8, 2008. The parties stipulated as to grounds for divorce, and they owned no real estate and had no cash assets to divide. The issues at trial centered on the parenting plan and the designation of the children's primary residential parent.

At the trial, Father asserted that he should be designated as the primary residential parent for the children because he is an active, engaged parent, and because Mother interferes in his relationship with the children by not accepting his phone calls. He contended that Mother was to blame for the parties' separation because she had an affair during the marriage. Father claimed that Mother inappropriately medicated the children with Benadryl so that they would fall asleep early, particularly on evenings when her current boyfriend visited Mother's home. In addition, Mother allegedly had been arrested for theft while two of the children were in her presence. Nevertheless, Father acknowledged that Mother was a "really good" mother to the children until the parties separated.

For her part, Mother asserted that she should be designated primary residential parent because Father is a recovering alcoholic, although she acknowledged that he had not abused alcohol since 1981. Mother also contended that Father physically abused her on several occasions, once requiring stitches on the side of her face. This abuse, she claimed, was one of the reasons she wanted a divorce. Mother also asserted that Father engaged in an inappropriate sexual relationship with another woman via the internet. Evidence was submitted at trial to show that the children were doing well at the school they attended, which is located in the school district where Mother lived; Father lived in a different school district. The school counselor and the principal for the children's school both testified at trial that the children were polite, well-behaved children who made good grades.

At the conclusion of the hearing, the trial court adopted Mother's proposed parenting plan and designated her as the children's primary residential parent. The trial court noted that either party could have been designated the primary residential parent. The trial judge explained that he designated Mother as the primary residential parent because, given Father's age, he needed to focus on earning money for the benefit of the family:

This is a refreshing case to me because I wouldn't have a minute's worry about placing the children with either party in this case. In fact, I go down the list of factors

that you consider in making child custody decisions contained in Tennessee Code Annotated section 36-6-106 and every factor I see, for example the one that says the mental and physical health of the parents, and I have got a lady that has got a problem with cancer, and a man that's 58 years old and has a problem with diabetes, and I mean there's nothing in that to pick between either one of them.

The factor that I think is important, and it's sort of a long-term factor, and that is that Mr. Brown in this case is 58 years old and I realize that he has got a limited period of time within which to make money, not only for himself but for this family, and to help these children in college. And I really think it's in the children's best interest and the family's best interest if we let him do that. And for that reason I have decided that Mrs. Brown should . . . be the primary residential parent for the children.

The trial court declined to award Mother monthly alimony, but awarded her \$5,000 in attorney's fees as alimony *in solido*. On March 12, 2008, the trial court entered an order consistent with its oral ruling. From this order, Father now appeals.

On appeal, Father argues that the trial court erred in designating Mother as the primary residential parent based on his age. He claims that the proof clearly showed that he should have been designated the primary residential parent under the relevant factors set out in Tennessee Code Annotated § 36-6-106.¹ In addition, Father argues that the trial court erred in awarding Mother

¹The statute provides that, in determining which parent to designate as the primary residential parent, the trial court shall consider "all relevant factors," including:

- (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a nonperpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;
- (4) The stability of the family unit of the parents or caregivers;
- (5) The mental and physical health of the parents or caregivers;
- (6) The home, school and community record of the child;
- (7)(A) The reasonable preference of the child, if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those of

(continued...)

\$5,000 in alimony *in solido* for attorney's fees, particularly in light of its determination that an award of monthly alimony was not appropriate in this case.

We review residential parenting decisions *de novo* on the record, presuming that the trial court's findings of fact are correct unless the evidence preponderates otherwise. **Kendrick v. Shoemaker**, 90 S.W.3d 566, 569 (Tenn. 2002); **Hass v. Knighton**, 676 S.W.2d 554, 555 (Tenn. 1984). Because these decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings, trial courts are given broad discretion to fashion appropriate arrangements that best suit the unique circumstances of a given case. **Adelsperger v. Adelsperger**, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Given the broad discretion given to trial courts in making residential parenting decisions, we are reluctant to second-guess a trial court's determination in such matters. **Nelson v. Nelson**, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Similarly, an award of attorney's fees as alimony *in solido* is largely discretionary with the trial court, and the appellate court will not ordinarily interfere with such an award unless the trial court did not appropriately exercise its discretion. **Owens v. Owens**, 241 S.W.3d 478, 495-96 (Tenn. Ct. App. 2007) (citing **Aaron v. Aaron**, 909 S.W.2d 408, 411 (Tenn. 1995)). "A trial court fails to exercise its discretion properly when its decision is not supported by the evidence, when it applies an incorrect legal standard, when it reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Id.* at 496 (citing **Biscan v. Brown**, 160 S.W.3d 462, 468 (Tenn. 2005)).

In designating Mother as the children's primary residential parent, the trial court explained that it had "gone down the list of factors that you consider in making child custody decisions" as enumerated in Tennessee Code Annotated § 36-6-106 and concluded that none of the factors

¹(...continued)

younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and

(10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

T.C.A. § 36-6-106(a) (2005).

weighed heavily in favor of either parent. As an example, the trial court noted the fifth factor, “the mental and physical health of the parents,” and concluded that the parties were equal with respect to their ability to care for the children. The determinative factor, the trial court found, was that 58-year-old Father needed to be able to work hard in his remaining prime earning years to continue to support his family, and that designating Mother as the primary residential parent was in the children’s best interest.

The list of factors enumerated in Section 36-6-106(a) to be considered in making a primary residential parent determination is not exclusive. Rather, the statute requires a trial court to consider “all relevant factors” in making such a determination. *See* T.C.A. § 36-6-106(a) (2005). Since the children were born, Father has been the only breadwinner for this family. Quite apart from Father’s age, it is clear that, if these children are to have the financial support required to meet their needs, it will be through Father. In the type of work Father performs, his earnings are driven by the hours he works. If Mother is designated as the primary residential parent, Father will be better able to work the hours necessary to meet the children’s financial needs. Therefore, while the trial court may have referred to Father’s age, the primary consideration appears to have been that the fullest use of Father’s earning capacity is clearly in the best interest of these children. That is not an inappropriate factor to consider. Thus, in reviewing the statutory factors and the record as a whole, we find no abuse of discretion in the trial court’s decision to designate Mother as the primary residential parent.

The trial court denied Mother’s request for monthly alimony, but nevertheless awarded Mother \$5,000 in attorney’s fees as alimony *in solido*. Father argues that this award constituted an abuse of discretion, because such awards are typically intended to adjust the marital property division, and the parties did not dispute the division of their marital property in this case. He claims that the award of alimony *in solido* was not warranted under the circumstances. In response, Mother notes that an award of alimony *in solido* is authorized by Tennessee Code Annotated § 36-5-121(d)(5), which provides that “[a]limony *in solido* may be awarded in lieu of or in addition to any other alimony award, in order to provide support, including attorney fees, where appropriate.” Given her need for the alimony and Father’s ability to pay, Mother argues, the award did not constitute an abuse of discretion.

The trial court did not explicitly set forth its reasons for awarding alimony *in solido* to Mother. The two most important factors in determining whether to award alimony are the need of the economically disadvantaged spouse and the other spouse’s ability to pay. *Riggs v. Riggs*, 250 S.W.3d 453, 456 (Tenn. Ct. App. 2007). Here, the trial court determined that Mother’s earning capacity was \$900 per month, and that Father had an earning capacity of \$3,495 per month. Mother testified that she had paid her first attorney \$2,200, and that she had paid her second attorney \$1,700 and still owed him \$1,400 in fees. She retained a third attorney, who represented her at trial and on appeal, and her family helped her pay a portion of that attorney’s fees. An affidavit was submitted showing that Mother owed \$13,926 in fees to her third attorney. Father testified that he owed \$5,000 in attorney’s fees, and that he had paid them in full.

Under the circumstances in this case, we find that the trial court did not abuse its discretion in awarding Mother alimony *in solido* of \$5,000 for attorney's fees. The award represented only a portion of the total amount of attorney's fees owed by Mother. Father has a substantially higher earning capacity, and Mother had no liquid assets from which to pay attorney's fees. Mother is clearly the economically disadvantaged spouse, and she was not granted monthly alimony. As Mother notes, the applicable statute authorizes an award of alimony *in solido* for attorney's fees in lieu of or in addition to other types of alimony. Such an award is appropriate when the spouse seeking the award has insufficient funds to pay the fees or would be required to deplete her resources in order to pay the expenses. *See Moffitt v. Moffitt*, No. W1999-02403-COA-R3-CV, 2000 WL 33223083, at *6 (Tenn. Ct. App. Nov. 13, 2000). Under all of these circumstances, we find no abuse of discretion in the trial court's decision to award Mother \$5,000 in alimony *in solido* for attorney's fees.

Finally, Mother requests her attorney's fees on appeal. In domestic relations cases, this Court may award appellate attorney's fees to the economically disadvantaged spouse as additional support. *See Elliott v. Elliott*, 149 S.W.3d 77, 88 (Tenn. Ct. App. 2004). We find that such an award is appropriate in this case. Therefore, the cause is remanded to the trial court for a determination as to the reasonable amount for such fees. *See Folk v. Folk*, 357 S.W.2d 828, 828-29 (Tenn. 1962).

The decision of the trial court is affirmed. Costs on appeal are to be taxed to Appellant William Richard Brown and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE